

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

CHIKA,

Plaintiff,

V.

HOWARD CHANSKY, BORIS
KOVALENKO MD., DR. TONG L. MD
AM. LK VA., ANGELA D. OR RN.
BSN., WANDA RN AM. LK,

Defendant.

CASE NO. 16-6036 RJB

ORDER REGARDING 12(B)(1)
MOTION TO DISMISS AND
NOTICE TO PRO SE PLAINTIFF

This matter comes before the Court on the United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction. Dkt. 8. The Court has considered the motion and record, and is fully advised.

I. PROCEDURAL HISTORY

On October 13, 2016, Plaintiff filed this case, *pro se*, asserting that various care providers at the Veteran's Administration denied or delayed him medical care. Dkt. 1-1, at 1-5. He seeks damages, and "is demanding that they pay for the air they bread [sic] by giving 7.77 cents to the

1 orphans and battered womens [sic] shelter and the vets of foreign wars every day 7 days a week
2 for 50 years.” *Id.*

3 On January 19, 2017, the Defendant filed a Motion to Dismiss pursuant to Fed. R. Civ. P.
4 12(b)(1). Dkt. 8. It argues that the case against it should be dismissed pursuant to Rule 12(b)(1)
5 because Plaintiff failed to file an administrative claim as required under the Federal Torts Claims
6 Act, 28 U.S.C. §§ 2675 (a), and so this court does not have jurisdiction to consider the claims.
7 *Id.* The Defendant further argues that, to the extent that Plaintiff asserts claims related to the
8 denial of veterans’ benefits, this court is divested of jurisdiction to consider those claims under
9 the Veterans’ Judicial Review Act, 38 U.S.C. § 511, and so the case should be dismissed. *Id.*
10 The motion to dismiss was noted for consideration on February 10, 2017. *Id.* Plaintiff did not
11 timely respond.

12 **II. MOTION TO DISMISS NOTIFICATION FOR PRO SE LITIGANTS**

13 Plaintiff is reminded that “[p]ro se litigants must follow the same rules of procedure that
14 govern other litigants,” *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997),
15 including the Federal Rules of Civil Procedure and the Local Civil Rules of the Western District
16 of Washington (“Local Rules”). Plaintiff is further reminded that although his pro se pleadings
17 are held to a “less stringent standard than formal pleadings drafted by lawyers,” he still must meet
18 the requirements of the rules. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

19 Pursuant to Fed. R. Civ. P. 12(b), a party may assert the following defenses in a motion to
20 dismiss: “(1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) improper
21 venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim
22 upon which relief can be granted; and (7) failure to join a party under Rule 19.”

1 Plaintiff is notified that under Fed. R. Civ. P. 12 (b)(1), a complaint must be dismissed if,
 2 considering the factual allegations in the light most favorable to the plaintiff, the action: (1) does
 3 not arise under the Constitution, laws, or treaties of the United States, or does not fall within one
 4 of the other enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case
 5 or controversy within the meaning of the Constitution; or (3) is not one described by any
 6 jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v.*
 7 *Tinnerman*, 626 F.Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal
 8 question jurisdiction) and 1346 (United States as a defendant). When considering a motion to
 9 dismiss pursuant to Rule 12(b)(1), the court is not restricted to the face of the pleadings, but may
 10 review any evidence to resolve factual disputes concerning the existence of jurisdiction.

11 *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052
 12 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). A federal court
 13 is presumed to lack subject matter jurisdiction until plaintiff establishes otherwise. *Kokkonen v.*
 14 *Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *Stock West, Inc. v. Confederated*
 15 *Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, plaintiff bears the burden of proving the
 16 existence of subject matter jurisdiction. *Stock West*, 873 F.2d at 1225; *Thornhill Publishing Co.,*
 17 *Inc. v. Gen'l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

18 The United States relies on materials outside the pleadings in their motion to dismiss.
 19 Dkt. 9. Plaintiff is notified that this motion to dismiss “is like a motion for summary judgment in
 20 that the district court will consider materials beyond the pleadings.” *Stratton v. Buck*, 697 F.3d
 21 1004, 1008 (9th Cir. 2012). Plaintiff is further notified that a party opposing the motion to
 22 dismiss has the “right to file counter affidavits or other responsive evidentiary materials.” *Id.* If
 23 Plaintiff does not submit his own evidence in opposition, the motion to dismiss, if appropriate,
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1 may be granted. *Id.* Plaintiff is reminded that if the motion to dismiss is granted, that may end
2 his case.

3 To the extent that the United States seeks summary dismissal of Plaintiff's Complaint
4 pursuant to Fed. R. Civ. P. 56, Plaintiff is notified that if one of the parties files a Motion for
5 Summary Judgment pursuant to Fed. R. Civ. P. 56, the opposing party must respond, by
6 affidavits or as otherwise provided in Rule 56, and must set forth specific facts showing that
7 there is a genuine issue for trial. In the event defendant files a motion for summary judgment by
8 which it seeks to have his case dismissed, Plaintiff is notified that summary judgment under Rule
9 56 of the Federal Rules of Civil Procedure will, if granted, end his case.

10 Rule 56 tells Plaintiff what he must do in order to oppose a motion for summary
11 judgment. Generally, summary judgment must be granted when there is no genuine issue of
12 material fact—that is, if there is no real dispute about any fact that would affect the result of
13 Plaintiff's case, the party who asked for summary judgment is entitled to judgment as a matter of
14 law, which will end Plaintiff's case. When a party the Plaintiff is suing makes a motion for
15 summary judgment that is properly supported by declarations (or other sworn testimony).
16 Instead, Plaintiff must set out specific facts in a verified complaint, declarations, depositions,
17 answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict
18 the facts shown in the Defendants' declarations and documents and show that there is a genuine
19 issue of material fact for trial. If Plaintiff does not submit his own evidence in opposition,
20 summary judgment, if appropriate, may be entered against him. If summary judgment is granted,
21 Plaintiff's case will be dismissed and there will be no trial. *See Rand v. Rowland*, 154 F.3d 952
22 (9th Cir. 1998).

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1 If Plaintiff does not file a response providing the appropriate documentation as described
2 above, this case may be dismissed and there will be no trial.

3 **III. RE-NOTE OF PENDING MOTION TO DISMISS**

4 Plaintiff has failed to respond to the motion. Plaintiff is notified that pursuant to Western
5 District of Washington R. Civ. P. 7(b)(2), “[i]f a party fails to file papers in opposition to a
6 motion, such failure may be considered by the court as an admission that the motion has merit.”
7 In light of Plaintiff’s *pro se* status, Defendant’s Motion to Dismiss for Lack of Subject Matter
8 Jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1) (Dkt. 8) should be renoted to February 24,
9 2017. Plaintiff’s response, if any, should be filed by February 21, 2017 (ordinarily it would be
10 due the Monday before the noting date, but that Monday is a federal holiday). Defendant’s
11 reply, if any, should be filed by February 24, 2017.

12 **IV. CAPTION**

13 On January 6, 2017, the Defendants filed a pleading entitled “Notice of Substitution Pursuant
14 to 28 U.S.C. § 2679(d)(1) and Certification of Annette L. Hayes in Support thereof.” Dkt. 7. In
15 this pleading, the Attorney General for the Western District of Washington, Annette L. Hayes,
16 certified that the individually named Defendants “are federal employees for purposes of coverage
17 under the Federal Tort Claims Act, 28 U.S. C. § 1346.” Dkt. 7.

18 Pursuant to 28 U.S.C. § 2679(d)(1):

19 Upon certification by the Attorney General that the defendant employee was
20 acting within the scope of his office or employment at the time of the incident out
21 of which the claim arose, any civil action or proceeding commenced upon such
claim in a United States district court shall be deemed an action against the United
States under the provisions of this title and all references thereto, and the United
States shall be substituted as the party defendant.

22 The January 6, 2017 pleading should be construed as a motion to substitute the United
23 States for the individually named Defendants and to amend the caption to reflect the same. No
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1 opposition was filed. The caption should be amended, replacing the “United States of America”
2 as the defendant and removing the individual Defendants, in all further pleadings filed in this
3 case.

4 **ORDER**

5 It is **ORDERED** that:

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- 7 • Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction, pursuant to Fed.
R. Civ. P. 12(b)(1) (Dkt. 8) **IS RENOTED** to February 24, 2017;
- 8 • Plaintiff’s response, if any, should be filed by February 21, 2017;
- 9 • Defendant’s reply, if any, should be filed by February 24, 2017;
- 10 • The caption **SHALL** be amended to replace the individual defendants with “United
11 States of America.”

12 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
13 to any party appearing *pro se* at said party’s last known address.

14 Dated this 10th day of February, 2017.

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17 ROBERT J. BRYAN
18 United States District Judge
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